88-673
No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

—o—

EVELYN JORDAN,

Petitioner,

vs.

WILLIAM P. CLARK, SECRETARY OF THE DEPARMENT OF INTERIOR,

Respondent.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

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QUESTIONS PRESENTED FOR REVIEW

I.

Does the 7th Amendment of the Constitution entitle the Petitioner to a Jury Trial for her claim brought under Title VII of the Civil Rights Act of 1964, when Petitioner demanded a jury trial?

II.

When the Trial Court held that Petitioner had established a prima facie case of sexual discrimination did the Trial Court err when it did not require the Government to show by clear and convincing evidence, that it had no improper motives in taking adverse action against Petitioner?

PARTIES TO THE PROCEEDINGS

Petitioner was the appellant before the United States Court of Appeals for the Ninth Circuit and she was the plaintiff in the Trial Court for the United States District for the District of Alaska.

Respondent was the appellee and the defendant in these respective courts.

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OPINIONS BELOW

The Opinion of the Ninth Circuit United States Court of Appeals was argued and submitted on March 17, 1988 in San Francisco, California and was filed on May 24, 1988. Its number is 86-3985 D.C. No. CV-A78-290-HRH and is printed in the Appendix merged into this Petition as App. 6 to Petition's Writ of Certiorari. The Order denying Petitioner's right to a jury trial is from the decision of the United States District Court, District of Alaska and is also printed in Petitioner's Appendix merged herein at App. 4. The Statement of Issues Presented for Review in the United States Court of Appeals for the Ninth Circuit has also been made part of Petitioner's Appendix at App. 5 and states at point 1 that the Court did err in failing to allow Plaintiff to have her case heard by a jury.

———o———

JURISDICTION

The Judgment of the Ninth Circuit United States Court of Appeals was filed on May 24, 1988. A Petition for Reconsideration and Rehearing was dated July 6, 1988. The Ninth Circuit filed its Order on July 19, 1988 denying Petitioner's request for Reconsideration and Rehearing. See App. 8. A Petition for Writ of Certiorari to this Court was filed on or before October 14, 1988. Jurisdiction of the Supreme Court is involved pursuant to 28 U.S.C. Section 1254(1) and Supreme Court Rule 19.5.

———o———

STATUTES INVOLVED

1. Title VII protects government employees from discrimination on the bases of race, color, religion, sex or national origin. 42 U.S.C. Section 2000e-16(a) (1982).

2. After the exhaustion of administrative remedies, a government employee may file a civil suit against his or her employer under 42 U.S.C. Section 2000e-16(c).

3. "An employee may file a civil action in the United States District Court to enjoin the Respondent from engaging in such unlawful employment practices, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the Court deems appropriate." 42 U.S.C. Section 2000e-5, e-5(f)(1), and e-5(g).

4. The Seventh Amendment to our United States Constitution provides that in suits at common law, where the value and controversy shall exceed $20.00, the right of trial by jury shall be preserved.

5. 42 U.S.C. Section 3612, authorizes private plaintiffs to bring civil actions to redress violations of Title VIII, The Fair Housing Provisions of the Act, and provides that "the Court may grant, as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 in punitive damages, together with Court costs and reasonable attorneys' fees . . ."

———o———

STATEMENT OF THE CASE

Petitioner Jordan, a former Federal Employee, filed a complaint with her employer, the U.S. Fish and Wildlife Service, alleging sexual discrimination. An investigation concluded that Jordan had not been discriminated against, but that there had been retaliation against her for filing her complaint. After lengthy review, no sexual discrimination was found. Jordan next sued alleging sexual discrimination and retaliation under Title VII. She requested a jury trial. The Trial Court first processed its pretrial order noting that the case would be tried by jury. The Government, somewhat belatedly, later filed a motion to deny plaintiff a trial by jury. The Trial Court ruled that plaintiff did not have a right to trial by jury and the case would be tried by the Court. Petitioner also claimed that after returning to work she was harassed by being given a clerical job. She subsequently went on leave. She was fired after she refused to return to work. Upon trial, the Judge found that Jordan had not been discriminated against on the basis of her sex, that she had not been retaliated against for filing an administrative complaint, and that she had not been constructively terminated.

Plaintiff appealed the case to the Ninth Circuit and in her first point for appeal alleged that the Court erred when it denied plaintiff's right to a jury trial. Petitioner also argued, in the Ninth Circuit and in her Motion for Reconsideration, that when the Trial Court held that Petitioner had established a prima facie case of sexual discrimination burden of proof should have shifted to the Government to show, by clear and convincing evidence, that it had no improper motive in taking adverse actions against the Petitioner.

The issue of jury trial and the Respondent's burden of proof after Petitioner has made a prima facie, are now presented to this Court in this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. Either the Civil Rights Act, or the Seventh Amendment, or both, requires a jury trial upon demand by one of the parties.

The United States Supreme Court has not clearly ruled whether a Title VII claimant is or is not entitled to a jury. The right to a jury trial is of such profound importance that this Court should rule on this fundamental question.

Some Circuits treat claimants differently under our Civil Rights Legislation. For example, this Court has ruled in *Curtis v. Loether* that a Title VIII claimant, under 42 U.S.C. Section 3612, is entitled to a jury trial upon demand. *See Curtis v. Loether,* 415 U.S. 189, 194, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974).

In this case the Court faced the question whether the Civil Rights Act or the Seventh Amendment requires a jury trial, upon demand by one of the parties, in an action for damages and injunctive relief under this section. The Court concluded that the Seventh Amendment did.

To make this determination, the Court analyzed common law to include suits in which legal rights were to be ascertained and determined, in contra distinction to those

where equitable rights alone were recognized and equitable remedies were administered.

The identification of common law was necessary because the Seventh Amendment provides that in suits at common law, where the value and controversy shall exceed $20.00, the right of trial by jury shall be preserved.

The Court found that the Seventh Amendment did apply to Title VIII claims because the claims came under the common law meaning of our Seventh Amendment to our United States Constitution.

Do Title VII claims come under common law within the meaning of our Seventh Amendment? The Court in *Curtis, supra,* did not answer this question, but it did compare Title VII to Title VIII to help illustrate why Title VIII involves suits in which legal rights were to be ascertained and determined in contra distinction to those where equitable rights alone were recognized.

The Court stressed that 42 U.S.C. Section 3612 provided statutory authority to award the plaintiff actual damages and not more than $1,000 in punitive damages together with Court costs and reasonable attorneys' fees. The Court found the authorization for these damages rendered a Title VIII case sufficiently akin to a legal case for damages.

The Ninth Circuit, however, in *Slack v. Havens,* 522 F.2d 1091, 1094 (9th Cir. 1975) focused upon the remedy of reinstatement in Title VII to find that Title VII was essentially equitable in nature, as opposed to legal, and that, therefore, a claimant in Title VII does not have a right to a jury trial.

The problem is that the right to a jury trial is so fundamental, that all claimants under our Civil Rights Legislation should be treated equally and all of them should have the same fundamental constitutional right to a jury trial.

42 U.S.C. Section 2000e-5(g) does not only provide for reinstatement or hiring of employees, but it also provides for back pay. Back pay or lost earnings is legal in nature. It is the damage awarded under our common law cases. As such, it can just as easily be reasoned that Title VII claimants have the same right to a jury trial as Title VIII claimants.

This Court should also decide that Title VII claimants are also entitled to a jury trial so that the Circuit Courts have a clear understanding as to the rights of the claimants. The Court of Appeals in the 3rd Circuit in *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973) pointed out that relief under Title VII "is intended to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination" and, therefore, reversed a lower court ruling that male employees who retired under a discriminatory pension plan could not receive damages to compensate them for their lost retirement benefits. Thus we see that Title VII cases are based upon a recovery of damages, just the way Title VIII cases are. It is an inconsistency to allow some Circuits to conclude that a jury trial is discretionary with the Court in Title VII cases while it is a right in other Civil Rights Legislation.

Some constitutional rights are of such fundamental importance as to require certainty, clarity, and equality in

their application. Even Title VII itself protects government employees from discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. Section 2000e-16(a) (1982). It is not a sequitur to allow some Circuit Courts to deny a trial by jury under certain sections of the Civil Rights Act while other Circuits show a strong preference to honor the right to a jury trial as to all sections. There needs to be uniformity among all the Circuits on this important point and there needs to be uniformity as to the right to trial by jury throughout our Civil Rights Legislation.

Additional examples can be provided as to how the remedies afforded in Title VII can just as easily be determined to be legal as equitable. Punitive damages are common law in nature within the meaning of our Seventh Amendment. Michael J. Goldberg in Volume 9, Harvard Civil Rights—Civil Liberties Law Review, pages 334 through 370, advances the proposition that punitive damages are appropriate in a Title VII case to warn the defendant not to repeat his wrongful conduct and to deter others from following his example. The Law Review Article stresses that Title VII cases are particularly suitable for punitive damages not only for the plaintiffs, but because the community as well, may be outraged by the discriminatory conduct in an employment discrimination case. The trend is probably towards punitive damages in Title VII cases. As such, the common law right to a jury trial should be recognized.

Consistency is required in this most fundamental area. Presently, certain Circuits may hold that a Title VII claimant does not have a right to a jury trial. District Judges

in the same Circuits, however, are giving jury trials when they think they should. At other times they are denying jury trials. Then there are other Circuits that almost automatically award jury trials in Title VII cases when they are demanded. This pattern of inconsistency within our Civil Rights Legislation and Remedies itself "smacks" of unfair and/or, even, discriminatory practices. With no disrespect intended, it is possible that certain Circuit Courts, when judged in relation to all the other Circuit Courts, are even, themselves, engaged in promoting discriminatory practices in deciding which select few get jury trials and which don't.

In *Bacon Theaters v. Westover*, 395 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (U.S. 1959) the Court held that where there is a merger of legal and equitable claims that it was imperative that the adjudication of equitable claims should not prevent or take away the jury trial of the legal issues. It is respectfully submitted that in the instant case back pay is a legal issue. Damages are legal issue. Loss of retirement benefits are a legal issue. Punitive damages are a legal issue. When we are trying these important legal issues, people deserve equal treatment throughout the Circuits while litigating under the Seventh Amendment of our Constitution and our Civil Rights Legislation. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (U.S. 1962) is another holding that states that the mere characterization of an issue as essentially legal or incidental to the equitable issues should never be used to deny a jury trial. This is exactly what a few of our Circuits have done and this is why this Court should answer the question that it did not in *Curtis v. Loether*, *supra*. Does

the Civil Rights Act or the Seventh Amendment require a jury trial upon demand in the instant case?

II. When the Trial Court held that Petitioner had established a prima facie case of sexual discrimination, the burden of proof shifted to the Government to show by clear and convincing evidence that it had no improper motive in taking adverse action against the Petitioner.

The Trial Court found that Petitioner had established a prima facie case of sexual discrimination. The Court found that there was some evidence of unwelcome sexual advances. There was some evidence of harassment that arose to the level of effecting a condition of employment and there was some evidence of a psychological well being problem, in this case, because of the action of the Government. There is some evidence of an abusive work environment. Based upon these findings, the Court required the Government to go forward with its portion of the case. The Court, however, did not require the Government to show by clear and convincing evidence that it had no improper motives in taking adverse actions against the petitioner. This was error.

Meritor Saving Bank F.S.D. v. Vinson, et al., 477 U.S. 57 (U.S. 1986) holds "a claim of hostile environment or sexual harassment is a form of sex discrimination that is actionable under Title VII." Upon Petitioner having made a prima facie showing of hostile environment or sexual harassment, the framework of *Cohen v. Fred Myer, Inc.*, 686 F.2d 793 (9th Cir. 1982) is to be followed by the Trial Court or jury. *Cohen supra* holds that, upon the prima facie showing, the burden must shift to the employer to show by clear and convincing evidence that it

had no improper motives in taking adverse actions against the plaintiff. Petitioner testified that as a result of the hostile environment and sexual harassment, her male supervisor delayed submitting her promotion papers, that she remained at a GS-5 level longer than necessary, that her supervisor increased her duties without amending her job description, that her supervisor denied her request to attend management courses, that her supervisor undermined her position by taking away her higher level duties, that her supervisor gave her several poor performance appraisals and put derogatory memos in her file, that he directed her work to other employees, and that she was generally given a position limited to clerical work. The Government never rebutted these allegations, or at best, the Government certainly did not meet its burden of showing by clear and convincing evidence that this action was not retaliatory in nature, for Petitioner having filed her claim against the Government and for Petitioner not yielding to the sexual harassment. The Trial Court just determined that, although these actions may have taken place, that their reason was to avoid a personality conflict between the parties. These kinds of findings are themselves pretextural in nature and fall far short of the Government heavy burden of proof. This case should also be reversed for the framework in *Cohen supra* not being followed, to wit: requiring the Government to show by clear and convincing evidence that it had no improper motives in taking adverse actions against the plaintiff. And finally, the case should be reversed for the framework in *Meritor supra* not being followed, to wit: after petitioner made her prima facie case, the government was never

required to prove that her job environment was not offensive. Both the trial court and the Ninth Circuit never applied "the offensive environment theory" at any stage of the adjudication of this case. It is respectfully submitted that this was prejudicial to petitioner's case.

III. CONCLUSION

The Seventh Amendment of the Constitution entitles either party to demand a jury trial in an action for Title VII damages just as it does in an action for Title VIII damages.

It is important for this Court to provide uniformity among the Circuits on the jury trial question as to Title VII claims and it is important for this Court to provide equal treatment under the law to the claimants themselves who are bringing their actions under the Civil Rights Act.

When the Court found that plaintiff established a prima facie case of sexual discrimination, the burden of proof should have shifted to the Government requiring the employer to show, by clear and convincing evidence, that it had no improper motive in taking adverse actions against the plaintiff. It was error not to put the Government to the burden of proof.

Respectfully submitted this 7th day of October, 1988.

PESTINGER, DONOVAN & MELVIN

By: /s/ R. SAM PESTINGER
R. SAM PESTINGER
of Attorneys for Petitioner,
Evelyn Jordan

Admitted to U.S. Supreme Court
April 6, 1981

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

EVELYN JORDAN CLARK,	)	
	)	
Plaintiff,	)	No. A78-290 Civil
	)	
vs.	)	AMENDED
	)	COMPLAINT FOR
JAMES WATT, Secretary of the Department of Interior,	)	DAMAGES AND
	)	VIOLATION OF
	)	CIVIL RIGHTS
Defendant.	)	

COMES NOW Plaintiff herein, EVELYN JORDAN CLARK, by and through her attorney, HELEN L. SIMPSON, and states and alleges as and for her complaint against the Defendant as follows:

First Cause of Action

I

This is a proceeding for relief against sex discrimination in employment by a department, agency, or unit of the Federal Government.

II

This is a suit authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 255, 42 U.S.C. 2000-e *et seq* as amended by the Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 111, 42 U.S.C. § 2000-e-16(c). Jurisdiction is invoked to secure the protection of and to redress the

deprivation of rights secured by the foregoing laws which provide for injunctive and other relief against discrimination in employment in the federal service based solely upon sex.

III

Plaintiff, EVELYN JORDAN CLARK, is a woman, and a citizen of the United States of America and State of Alaska, residing in the City of Anchorage.

IV

Defendant JAMES WATT is the Secretary of the Department of Interior, the head of a department of the United States Government. The Defendant, acting through his agents and servants, has intentionally discriminated against the Plaintiff as hereinafter more fully appears.

V

On or about the 15th day of May, 1972, RONALD C. DEVALL, an agent and servant of Defendant JAMES WATT, Secretary of the Department of Interior, invited Plaintiff to lunch at the Chef's Inn and during the course of the lunch advised Plaintiff that if she wished to continue working for United States Fish & Wildlife Service and the United States Department of the Interior and further if she wished to be promoted in rank while working with these agencies she would have to engage in sexual intercourse with him at least 2 or 3 times a week at a location of his choosing.

VI

That prior to said lunch and said lewd and outrageous proposition by RONALD C. DEVALL, an agent and servant of Defendant JAMES WATT, Secretary of the Department of Interior, the Plaintiff had at all times been and was a conscientious and well trained efficient employee of the United States Fish & Wildlife Service and the United States Department of the Interior.

VII

Plaintiff at the time of the sexual proposition by RONALD C. DEVALL, an agent and servant of defendant JAMES WATT, Secretary of the Department of the Interior, was divorced but an emancipated American woman free to have sex with whomever she desired and likewise free to refrain from sexual conduct with those she did not desire without being penalized by her employer for the choice she made independently and voluntarily and that RONALD C. DEVALL, an agent and servant of Defendant JAMES WATT, Secretary of the Department of Interior, should have so realized.

VIII

That the Plaintiff refused the sexual advances of RONALD C. DEVALL, an agent and servant of Defendant JAMES WATT, Secretary of the Department of Interior, and as a result he took immediate discriminatory reprisals, namely he deliberately delayed her promotion to GS-7 and denied annual within-grade increases, he denied her a promotion to GS-9, he deleted her of any supervisory responsibilities whatsoever, he humbled her and damaged her

reputation with fellow employees, he issued adverse promotional appraisals, performance ratings, and employee evaluations, he denied her the opportunity to engage in management training and he otherwise made her work as an employee with the United States Fish & Wildlife Service and the United States Department of the Interior as unpleasant as he possibly could all to Plaintiff's damage in the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00).

Second Cause of Action

I

Plaintiff's First Cause of Action is incorporated herein as Paragraph I of this her Second Cause of Action as though completely and fully set out.

II

After suffering the acts complained of in Plaintiff's First Cause of Action, Plaintiff filed a complaint of sexual discrimination against RONALD C. DEVALL with the United States Civil Service Commission.

III

Plaintiff first approached HENRY HANSEN, an agent and servant of Defendant JAMES WATT, Secretary of the Department of Interior, who was Plaintiff's EEO Counselor and freely discussed her legitimate complaints of sexual advances by RONALD C. DEVALL with HENRY HANSEN. HENRY HANSEN, an agent and servant of Defendant JAMES WATT, Secretary of the Department of Interior, then communicated Plaintiff's

private conversations during the consultations to fellow employees, which violated Plaintiff's trust, Hansen's fiduciary relationship to Plaintiff, and Hansen's duties as the EEO Counselor. In addition, HENRY HANSEN placed a memorandum in Plaintiff's official personnel file that should not have been so placed, inserted certain facts in his counseling report which were confidential and private and should not have been communicated to anyone and required fellow employees, namely Mary Smith, to type said counseling report but most of all communicated directly to RONALD C. DEVALL Plaintiff's counseling interviews, all to Plaintiff's damage in the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00). GORDON WATSON, Alaska Area Director of U.S. Fish & Wildlife Service was charged with enforcing departmental regulations and equal rights requirements. Instead, he participated and directed discriminatory acts against Plaintiff, tolerated and directed other employees to ostracize her so that it became impossible to perform her duties.

Third Cause of Action

I

Plaintiff realleges her First and Second Cause of Action as Paragraph I of her Third Cause of Action as though completely and fully set out.

II

This Cause of Action is an appeal trial de novo to the United States District Court from an adverse decision of the United States Civil Service Commission Appeals Review Board, which decision was served on Plaintiff on

October 1, 1978. The Defendant for this cause of action is JAMES WATT, Secretary of the Department of Interior, who acted through his agents and servants.

III

Plaintiff was employed as an Administrative Assistant, GS-7, United States Fish & Wildlife Service of the United States Department of the Interior, Anchorage, Alaska, at the time she filed a complaint with the United States Civil Service Commission.

IV

In her formal complaint with the United States Civil Service Commission Plaintiff alleged that she had been the victim of sex discrimination as a result of her spurning the advances of her supervisor, RONALD C. DEVALL, an agent and servant of Defendant JAMES WATT, Secretary of the Department of Interior, and that as a result she had been denied promotion to GS-9 in June, 1974 and denied training for career development.

V

That complaint was investigated in April, 1975 and a report was formally filed on April 25, 1975. Plaintiff later alleged that because she had in fact filed a complaint and an investigation had taken place that certain acts of reprisals had occurred and her allegation that reprisals had occurred was investigated in April, 1975.

VI

On April 26, 1976, the matter was disposed of administratively when the United States Fish & Wildlife Service

found no discrimination with regard to sex but did find that certain of the agents and servants of the Defendant JAMES WATT, Secretary of the Department of Interior, had in fact acted against the complainant for having filed a sex discrimination complaint. Plaintiff appealed that decision to the United States Department of the Interior and to the United States Civil Service Commission Appeals Review Board thereby exhausting her administrative remedies.

VII

The Appeals Board has found specifically that the United States Fish & Wildlife Service of the United States Department of the Interior was in fact in violation of the Plaintiff's counselor privilege and confidentiality because HENRY HANSEN disclosed confidential information not authorized for release by the Plaintiff. Also the Civil Service Appeals Board found specifically that HENRY HANSEN acted as he did because of inadequate training.

VIII

Because of the acts of the agents and servants of the Defendant JAMES WATT, Secretary of the Department of Interior, RONALD C. DEVALL and HENRY HANSEN and each of them, and because of the specific findings of the United States Civil Service Commission Plaintiff is entitled to be fully reinstated to her position with retroactive promotion in grade and rank as appropriate, to be proved at the time of trial, with the United States Fish & Wildlife Service and the United States Department of the Interior and to full back wages, back wages to be proven at the time of trial, plus lost benefits to be proven at the time of trial.

WHEREFORE, Plaintiff prays for judgment against the Defendant, JAMES WATT, Secretary of the Department of Interior, in the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) plus the cost of this action, plus a reasonable attorney's fee. Plaintiff further requests an order requiring the United States Fish & Wildlife Service and the United States Department of the Interior rehire Plaintiff immediately as an Administrative Assistant with retroactive grade and rank based upon her successor's rates and grade, pay her back wages, plus lost benefits to be proven at the time of trial, plus such other and further relief as to the court seems just and equitable in the premises.

DATED this 22nd day of December, 1982.

/s/ Helen L. Simpson
Helen L. Simpson
Attorney for Plaintiff.

APPENDIX 2

EDWARD J. REASOR, ESQ.
EDWARD J. REASOR, A
Professional Corporation
4337 Spenard Road
Anchorage, Alaska 99503
Attorney for Plaintiff
(907) 279-2431

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

EVELYN JORDAN CLARK, Plaintiff, vs. RONALD C. DEVALL, HENRY HANSEN, UNITED STATES FISH & WILDLIFE SERVICE and THE UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.	No..... DEMAND FOR JURY TRIAL

COMES NOW the Plaintiff, by and through her attorney EDWARD J. REASOR, A Professional Corporation, and demands trial by jury of all triable issues in the above-entitled action.

DATED this 27th day of October, 1978.

EDWARD J. REASOR, P.C.
Attorneys for Plaintiff

By /s/ Edward J. Reasor
EDWARD J. REASOR

APPENDIX 3

HELEN L. SIMPSON, Attorney for Plaintiff
401 E. Northern Lights Blvd., Suite 202
Anchorage, AK 99503 (907) 272-9322

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

EVELYN JORDAN, Plaintiff, vs. WILLIAM P. CLARK, Secretary of the Department of the Interior, Defendant.	No. A78-290 Civil RESPONSE TO MOTION FOR MODIFICATION OF PRE-TRIAL ORDER (Filed July 11, 1985)

The Court has already agreed to change the deadlines in the original pre-trial order, in part because of defendant's eleventh-hour complaint regarding jury trial. This case has gone through at least three pre-trials. Trial by jury was specified on December 22, 1980, June 22, 1982 and May 20, 1985.

Demand for jury trial was filed by plaintiff on October 27, 1978 and this demand has never been questioned before.

When the right to trial by jury exists is easily stated, but not nearly as easily determined, as one notes from examination of appellate rulings regarding just such questions.

In *Curtis v. Loether,* 415 U.S. 189 39 L.Ed 2d 260, 94 Sct 1005 (1974) the U.S. Supreme Court affirmed the right to jury trial under the Civil Rights Act of 1968. Under this Act, plaintiffs may bring civil actions for injunctive relief, actual damages and punitive damages for violation of the fair housing provisions of the Act. There had been a diversity of views in the lower Federal courts. The key to the decision that a jury trial is a right upon demand was that the damages action under § 812 of the Civil Rights Act of 1968 (42 USCS § 3612) sounds basically in tort—the statute merely defining a new legal duty.

The Supreme Court has not actually ruled on the right of a party to a jury trial in Title VII cases. They were particularly talking about an injunction covering the whole scope of a business rather than the case of one individual to be restored to her position and to recover lost wages.

Slack v. Havens, 522 F2d 1091 (1975) did find that jury trials need not be provided defendants in Title VII suits. However, other juris- dictions do permit jury trials, as in *Alexander v. Gardner Denver Co.,* 415 U.S. 36 39 L.Ed 2d 147. It might also be observed that no one ever appeals from a decision allowing a jury trial.

Preparation to date has been made in anticipation of a jury, rather than judge-tried case.

Surely there can be no prejudice to the defendants in a jury trial—if so, they would surely have objected years ago.

It is conceded that, if only equitable relief were asked, then jury trial would not be appropriate. However, the

remedy sought here is restoration to her position and wages lost as the result of the sex discrimination practiced against her and the retaliation against her in violation of 42 § 2000e-3.

It is respectfully requested that the jury trial setting remain in effect.

DATED this 10th day of July, 1985.

/s/ Helen L. Simpson
HELEN L. SIMPSON
Attorney for Plaintiff

I hereby certify that on July 11, 1985
I served a copy of the foregoing Response
upon Asst. U.S. Atty office attorney by
depositing it in the U. S. Mail, postage prepaid, in an
envelope addressed to him at the last address of said
attorney known to me.

/s/ Helen L. Simpson
Attorney for Plaintiff

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

EVELYN JORDAN,	)	
	) –	
Plaintiff,	)	
	)	No. A-78-290 Civil
vs.	)	
	)	ORDER
WILLIAM P. CLARK,	)	
Secretary of the Department	)	(Filed
of the Interior,	)	July 18, 1985)
	)	
Defendant.	)	
	)	

Defendant has, somewhat belatedly in the development of this case, moved from modification of the Court's pre-trial order as regards the characterization of this case as a "jury" case. The latter characterization of the case stemmed from the Court's scheduling and planning order filed January 3, 1985, which was in turn based upon a much earlier demand for jury trial by Plaintiff. The Court has not heretofore made any serious inquiry as regards the availability of a jury trial in this case, and neither party raised the matter during nor immediately following the Court's scheduling and planning order.

Be the foregoing as it may, it appears well settled that civil rights actions in the employment area are substantially in the nature of equitable proceedings, the remedies available to a Plaintiff being essentially equitable as opposed to legal. Legal remedies, such as back pay, are simply a necessary incident to the primary equitable re-

lief afforded by the civil rights act. Accordingly, a jury trial is not available to Plaintiff in this case. *Slack v. Havens,* 522 F.2d 1091, 1094 (9th Cir. 1975).

DATED at Anchorage, Alaska, this 18th day of July, 1985.

/s/ R. Holland
United States District Judge

cc: Judge Hardy
Simpson
Rosenbaum, ASST US ATTY
Jury Clerk
CC

APPENDIX 5

Thomas H. Dahl, Esq.
310 K. Street, Suite 300
Anchorage, Alaska 99501
(907) 276-1994

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

EVELYN JORDAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Case No.
WILLIAM P. CLARK,	)	A78-290-Civ.
Secretary of the Department	)	
Of The Interior,	)	
	)	
Defendant.	)	

STATEMENT OF ISSUES
PRESENTED FOR REVIEW

1. Did the Court err in failing to allow plaintiff to have her case heard by a jury?

2. Did the Court err in reviewing and considering the entire administrative record outside of the evidence presented in this *de novo* proceeding?

3. Was plaintiff prejudiced by her counsel's failure to object to inclusion of the entire administrative record as a defense exhibit?

4. Was plaintiff prejudiced by not having notice that the deposition of Gordan Watson was going to be videotaped?

5. Did the Court err in viewing the videotaped deposition of Gordan Watson after close of trial but before judgment was entered, thus precluding rebuttal testimony?

6. Did the Court err in refusing to allow reinstatement as a remedy?

7. Was plaintiff's counsel ineffective in failing to respond to the government's Motion for Partial Summary Judgment in a timely manner, causing the issue of whether reinstatement is a remedy to be before the Court without opposition?

8. Was plaintiff's counsel ineffective in failing to refer to retaliatory or discrimatory discharge as a claim for relief in the complaint, thus precluding reinstatement as a remedy?

9. Did the Court err in requiring plaintiff to appeal her removal in order to have reinstatement available to her as a remedy, when to do so at the time would force her to be returned to the very employment where the harassment occured, thus requiring her to do a futile act?

10. Did the Court err in considering and giving weight to the fact that no appeal was taken from plaintiff's removal from her position in 1980, when the evidence showed that the notice to plaintiff of her removal was faulty or non-existent?

11. Did the Court err in refusing to consider the damages suffered by plaintiff unless and until liability was shown, when the nature of this action was equitable and damages were not to be allowed?

DATED: July 9, 1986

/s/ Phyllis A. Hartke for
Thomas H. Dahl, Esq.
Attorney for Plaintiff

APPENDIX 6

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EVELYN JORDAN, *Plaintiff-Appellant,*	)	No. 86-3985
v.	)	D.C. No. CV-A78-290-HRH
WILLIAM P. CLARK, Secretary of the Department of the Interior, *Defendant-Appellee.*	)	OPINION

Appeal from the United States District Court
for the District of Alaska

H. Russel Holland, District Judge, Presiding

Argued and Submitted
March 17, 1988—San Francisco, California

Filed May 24, 1988

Before: Joseph T. Sneed, Cynthia Holcomb Hall and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Sneed

SUMMARY

Employment Discrimination

Appeal from judgment against Title VII suit. The court affirmed holding that an abusive work environment did not exist nor was appellant subject to retaliation for filing an administrative complaint.

Appellant Jordan filed a complaint with her employer, the U.S. Fish & Wildlife Service, alleging sexual discrimination. An investigation concluded that Jordan had not been discriminated against, but that there had been retaliation against her for filing her complaint. After lengthy review, no sexual discrimination was found. Jordan sued alleging sex discrimination and retaliation under Title VII. She claims that after returning to work she was harassed by being given a clerical job. She subsequently went on leave. She was fired after she refused to return to work. The district court granted defendant's motion for partial summary judgment. Upon trial, the judge found that Jordan had not been discriminated against on the basis of her sex, that she had not been retaliated against for filing an administrative complaint, and that she had not been constructively terminated.

[1] Jordan invokes the hostile or abusive work environment theory of sexual harassment. [2] The court did consider her allegations concerning unwelcome sexual advances and conduct of a sexual nature as factors in determining the existence of sexual harassment. The court concluded that an abusive environment did not exist. [3] Jordan argues that she was retaliated against for rejecting DeVall's advances and for filing an administrative complaint alleging discrimination. [4] Her alleged resistance to DeVall's advances only qualifies as protected activity if DeVall's advances actually occurred and were an unlawful employment practice under Title VII. The district court found this not to be the case. Its findings were correct. [5] Jordan's listed adverse actions, she claims, culminated in her constructive termination. [6] The district court examined all of the challenged actions

and correctly concluded that the conduct appears to be a clashing of personalities. [7] The district court properly granted partial summary judgment finding the defendant terminated Jordan because she refused to return to work. [8] She cannot challenge this partial summary judgment because she failed to follow Local General Rule 5(B)(4)'s procedural requirements.

COUNSEL

Thomas H. Dahl, Anchorage, Alaska, for the Plaintiff-Appellant.

Mark A. Rosenbaum, Assistant United States Attorney, Anchorage, Alaska, for the Defendant-Appellee.

OPINION

SNEED, Circuit Judge:

Evelyn Jordan appeals from a district court judgment against her in her Title VII suit in which she alleged sexual discrimination and harassment, retaliation for filing an administrative complaint, and constructive termination arising out of her employment with the U.S. Fish & Wildlife Service. We affirm.

I.

FACTS AND PROCEEDINGS BELOW

Evelyn Jordan began working for the U.S. Fish & Wildlife Service (Service) in April 1972. She was hired as an administrative assistant at the GS-5 level.[1] Her

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[1]The government says in its statement of facts that Jordan was hired as an administrative clerk and was "converted" to administrative assistant in September 1972, after the alleged

(Continued on following page)

immediate supervisor was an administrative officer named Ronald DeVall. In January 1975 Jordan filed an informal complaint and in February 1975 she filed a formal complaint with the Service, alleging that she had been discriminated against because of her sex. In particular, she alleged that during a lunch date DeVall had suggested that she sleep with him in order to keep her job and to get a promotion, and that after she refused, he retaliated against her.

The Service's investigator completed her report in April 1975. She concluded that Jordan had not been discriminated against, but that there had been retaliation against Jordan for filing her complaint. Jordan went on leave without pay that same month. Administrative proceedings within the Service, the Department of the Interior, and the Civil Service Commission consumed the next three-and-one-half years, and concluded in September 1978 with a decision by the Civil Service Commission Appeals Review Board that Jordan had not been sexually discriminated against.

The Board sent a copy of its decision to Jordan on September 22, 1978. On October 27, 1978, Jordan first filed suit against the Service in federal district court, alleging sex discrimination and retaliation under Title VII. Her complaint named the Service, the Department of the

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(Continued from previous page)

proposition by her supervisor. The government does not contest, however, the district court's finding that Jordan was hired as an administrative assistant. *See* Excerpt of Record (E.R.) tab 184 at 2. At most, the conversion of Jordan's position was a change from part-time to full-time, with no increase in GS level. Appellee's Brief at 15-16.

Interior, and two of her supervisors as defendants. On January 5, 1979, the defendants filed a motion to dismiss on the ground that Jordan's complaint did not name the Secretary of the Department of the Interior as the defendant, as required by 42 U.S.C. § 2000e-16(c). On March 14, 1979, the district court gave Jordan leave to amend her complaint, and on March 23, 1979, Jordan filed an amended complaint that named Cecil Andrus, then Secretary of the Department of the Interior, as a defendant.

Jordan returned to work in November 1978. She contends that her old position had not been abolished, and that she was harassed by being given a clerical job. The district court found that her old job "simply didn't exist anymore," and that she was assigned to do administrative work. E.R. tab 184 at 11. In January 1979 Jordan again went on leave without pay. The Service conducted a fitness hearing and as a result ordered Jordan to return to work in November 1979. Jordan did not return, and the Service terminated her employment in January 1980.

Jordan's first counsel did not move her case forward, and withdrew in March 1981. In October 1985, the district court granted the defendant's motion for partial summary judgment, holding that Jordan's termination in January 1980 was not improper. However, the court expressly reserved the possibility that Jordan might prevail on her other claims, including constructive termination, which might allow her to be reinstated in her job. E.R. tab 150.

The parties tried the case to the district court judge in March 1986. The judge found that Jordan had not been discriminated against on the basis of her sex, that she had not been retaliated against for filing an administrative

complaint, and that she had not been constructively terminated. Findings of Fact and Conclusions of Law, Excerpt of Record (E.R.) at 9, 11, 12. Jordan timely appealed.

II.

JURISDICTION

At the outset, we must address the defendant's claim that the district court lacked jurisdiction to hear this case because Jordan did not name the Secretary of the Interior as a defendant in her initial complaint. Resolution of this issue is more difficult than one might suppose. Our review is de novo, of course. *Lofton v. Heckler*, 781 F.2d 1390, 1392 (9th Cir. 1986).

Title VII protects government employees from discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-16(a) (1982). After pursuing administrative remedies, a government employee may file a civil suit against his or her employer under 42 U.S.C. §2000e-16(c), which states:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, . . . an employee . . . may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

We have stated that "the naming of the proper defendant within the 30-day period is a jurisdictional requirement."

Hymen v. Merit Sys. Protection Bd., 799 F.2d 1421, 1422 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 1900 (1987). Therefore, the requirement cannot be waived by the parties and must be addressed by this court. *Office & Professional Employees Ins. Trust Fund v. Laborers Funds*, 783 F.2d 919, 921 (9th Cir. 1986).

It is undisputed that the proper defendant was not named until five months after Jordan filed her initial complaint. The district court therefore lacked jurisdiction unless Jordan's amended complaint related back to her initial complaint under Federal Rule of Civil Procedure 15(c). 15(c) states:

> An amendment changing the party against whom a claim is asserted relates back if . . . within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.
>
> The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, . . . satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

See Schiavone v. Fortune, Inc., 477 U.S. 21, 29 (1986).

In her initial complaint, Jordan stated that she received notice of the final agency action on October 1, 1978. She therefore had until October 31, 1978 to fulfill Rule

15's requirements. The record indicates that on October 30, 1978 she served the U.S. Attorney for Anchorage, Alaska and mailed process to the U.S. Attorney General. *See* District Court Clerk's Record, Docket No. 4. Jordan's amended complaint thus related back to her initial complaint under Rule 15(c), and the district court had jurisdiction over her suit. *See Cooper v. United States Postal Service,* 740 F.2d 714, 717 (9th Cir. 1984), *cert. denied,* 471 U.S. 1022 (1985). Our jurisdiction rests upon 28 U.S.C. § 1291.

III.

DISCUSSION

On appeal, Jordan's arguments focus on alleged errors of the district court with respect to sexual harassment, retaliation, and the partial summary judgment on the propriety of the January 1980 termination.

Sexual Harassment

Jordan's harassment claim focuses on whether she was subjected to a hostile or abusive environment. The district court found that she was not; Jordan argues that the court misconstrued the law, ignored relevant evidence, and reached conclusions contrary to the evidence.

[1] In *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57 (1986), the Supreme Court endorsed the "hostile or abusive work environment" theory of sexual harassment. Under this theory, a sexually harassed plaintiff does not have to show that her harassment resulted in "tangible loss" of "an economic character" in order to prove a violation of Title VII. *Id.* at 64. It is sufficient for the plaintiff to show that "discrimination based on sex has created a hostile or abusive work environment." *Id.* at 66.

To make this showing, the plaintiff must demonstrate that she was subjected to "sexual advances, requests for sexual favors, [or] other verbal or physical conduct of a sexual nature," *id.* at 65 (quoting Equal Employment Opportunity Commission Guidelines, 29 C.F.R. § 1604.11(a));[2] that this conduct was unwelcome, *id.* at 65, 68; and that the conduct was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).[3]

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[2]In full, the Guidelines state, "Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1987) (footnote omitted).

[3]We note that the *Meritor* Court was concerned with construction of 42 U.S.C. § 2000e-2(a)(1), which makes it "an unlawful employment practice . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such employee's race, color, religion, sex, or national origin." Jordan sues under § 2000e-16(a), which states that "All personnel actions affecting [government] employees . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." The difference in wording between the two sections is immaterial in this context, and we find that Title VII protects government employees from sexual harassment to the same degree private employees are protected. *See Garcia v. Lawn*, 805 F.2d 1400, 1404 (9th Cir. 1986) ("Congress, in applying the anti-employment discrimination provisions of Title VII to the government, section 717, 42 U.S.C. § 2000e-16, expressed an intent to make all remedies that are available to employees of private employers available also to employees of the government.").

Before turning to Jordan's arguments, we must dispose of the defendant's contention that she did not raise the abusive environment theory below, and that it is therefore waived on appeal.

1. *Did the court consider the abusive environment theory of sexual harassment?*

The government, in arguing that Jordan did not raise the abusive environment issue before the district court, points to the Joint Statement of Issues, Supplemental Excerpt of Record (S.E.R.) tab 98, plaintiff's Final Statement of Issues, S.E.R. tab 91, and the Final Pre-trial Order, E.R. tab 169, and states that none of these documents identify abusive environment as an issue to be considered at trial.[4] The government is correct that these documents reflect a focus unaided by *Meritor Savings Bank,* but it is not correct that these documents never mention the issue of abusive environment. In the pre-trial Joint Statement of Issues, S.E.R. tab 98 at 3, Jordan proposed the following issue: "Did plaintiff's supervisors create an abusive working environment so that plaintiff was constructively

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[4]The government also implies that *Meritor* should not be applied retroactively. *Meritor* was decided after trial in this case. But, as both parties acknowledge, the issue of abusive environment had been raised successfully in other courts. *See, e.g., Bundy v. Jackson,* 641 F.2d 934, 943 (D.C. Cir. 1981); *Henson v. City of Dundee,* 682 F.2d 897, 902 (11th Cir. 1982). In fact, the district court in this case had previously recognized that a hostile work environment was a valid Title VII claim. *Jeppsen v. Wunnicke,* 611 F. Supp. 78 (D. Alaska 1985). Finally, as Jordan notes, "the EEOC guidelines clearly foreshadowed *Meritor.*" Reply Brief at 9. The EEOC issued these guidelines in 1980. The fact that so many courts, as well as the EEOC, had recognized abusive environment as a Title VII claim indicates that *Meritor* did not signal a change in the law, and that we therefore need not consider whether to apply it retroactively.

discharged, even before her actual discharge?" The district court adopted this issue in its final pre-trial order. *See* E.R. tab 169.

Moreover, it is clear that the court did consider whether Jordan was subjected to a hostile or abusive environment. In its Findings of Fact and Conclusions of Law, the district court concluded that Jordan "was not subjected to harassment which rose to the stature of a condition of employment or an abusive working environment." E.R. tab 184 at 12. The court also found that specific allegations by Jordan did not create an inference that an abusive environment existed. *See* E.R. tab 184 at 5, 6.

In reaching this conclusion, the court did not disregard Jordan's procedural rights in this type of case. Thus, after the defendant moved to dismiss at the close of Jordan's case, the court held that Jordan had established a prima facie case, stating, "There is some evidence of unwelcome sexual advances. . . . There is some evidence of harassment that rose to the level of affecting a condition of employment. And in that regard, what I'm saying is that there is some evidence of a psychological well-being problem in this case. There is some evidence of an abusive work environment, enough so that I feel that the Defendant must be required to go forward with its portion of the case." This language echoes the language of the Eleventh Circuit in *Henson v. City of Dundee,* 682 F.2d 897, 903-04 (11th Cir. 1982), which was relied upon by the Supreme Court in *Meritor.*[5] Finally, we note that this trial

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[5]We also note that Jordan's counsel called the trial court's attention to *Henson* in her opening argument to the court.

judge had had experience with this theory of recovery before. *See Jeppsen v. Wunnicke*, 611 F.Supp. 78 (D.Alaska 1985).[6]

2. *Was Jordan subjected to an abusive environment?*

[2] We now must decide whether the trial court erred in holding that an abusive environment did not exist in this case. Jordan argues that the district court misunderstood the hostile environment theory. In particular, she argues that the district court did not consider "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" as factors in determining the existence of sexual harassment. Appellant's Brief at 24. Jordan is incorrect. The court did consider those factors at some length, but concluded that they either did not occur, or were not sufficiently pervasive to alter the terms of employment and create an abusive work environment. *See* Findings of Fact 6-12, E.R. tab 184 at 4-6.

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[6]It is possible that the district court considered the issue only in the contexts of (1) DeVall's treatment of Jordan, *see* Finding of Fact 10, E.R. tab 184 at 5, and (2) the alleged retaliation against Jordan for rejecting DeVall's advances and for filing a complaint, *see* Finding of Fact 13, E.R. tab 184 at 6. In other words, the parties may have argued over whether an abusive environment existed without explicitly recognizing that the case law and the EEOC guidelines supported the theory that an abusive environment by itself could violate Title VII. But even if the issue was not clearly framed at trial as a separate theory of recovery, we have discretion to decide the issue on appeal, as long as the district court fully developed the factual record. *See Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985); *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978). The defendant gives us no reason to believe that a more careful framing of the issue would have resulted in additional facts being brought forward.

Jordan also challenges several of the court's factual findings, as well as its conclusion that Jordan was not subjected to a hostile or abusive work environment. The former we review under the clearly erroneous standard, while the latter is reviewed de novo.[7]

In challenging the district court's findings, Jordan relies largely on her own testimony, buttressed somewhat by that of her predecessor, Emily Beller. She simply ignores the testimony of the other witnesses at trial, many of whom disputed Jordan's allegations. It is true that with regard to many of her allegations, the trial court heard testimony only from DeVall and Jordan. But Jordan gives us no reason to doubt the court's decision not to credit her version of events. We may not set aside findings of fact unless we are " 'left with the definite and firm conviction that a mistake has been committed.' " *Johnson v. United States Postal Serv.*, 756 F.2d 1461, 1464 (9th Cir. 1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). In particular, "[c]redibility determinations are insulated from appellate review." *Johnson*, 756 F.2d at 1464. The court's findings here are far from clearly erroneous.

For example, Jordan says that DeVall harassed her by calling her at home. The court found that Jordan did

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[7]Its findings as to whether the plaintiff was subjected to unwelcome sexual advances or other conduct of a sexual nature are primarily factual. *See Meritor*, 477 U.S. at 68. But its final conclusion that this conduct was not so severe or pervasive that it altered the plaintiff's employment by creating an abusive environment "requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles." *See United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984). We therefore review that conclusion de novo.

not present sufficient evidence that the phone calls occurred. Finding of Fact 8, E.R. tab 184 at 4. She alleged that DeVall harassed her at work by touching her improperly. DeVall denied this. The court found it "inconceivable" that she would never have mentioned this allegation once during the lengthy administrative proceedings if the touching did occur, and found that what touching did occur "was of so insignificant a nature as to not rise to the stature of unwelcome sexual conduct." Finding of Fact 9, E.R. tab 184 at 5. Jordan alleged that DeVall made sexist comments at work. At trial, witnesses testified that many people in the office (both men and women) told off-color jokes.

Jordan's most serious allegation is that DeVall told her that she would have to sleep with him "two or three times a week in order to keep [her] job and get a promotion." Appellant's Brief at 13. DeVall testified that she propositioned him. The district court split the difference and decided that they "were more probably than not engaged in flirtatious conversation and conduct which could, and probably did, leave each of them with the impression that he or he had been the recipient of a sexual advance." Finding of Fact 6, E.R. tab 184 at 4. Again, this finding is not clearly erroneous. We agree, therefore, that the trial court did not err in holding that an abusive environment did not exist in this case.

B. *Retaliation*

[3] We now turn to Jordan's retaliation claim. She argues that she was retaliated against for rejecting DeVall's advances and for filing an administrative complaint alleging discrimination. Title VII states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (1982).[8] To succeed on a retaliation claim, a plaintiff must first establish a prima facie case. To establish such a case, Jordan must show "that she engaged in a protected activity, that she was thereafter subjected by her employer to adverse employment action, and that a causal link exists between the two." *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982); *see Wrighten v. Metropolitan Hosps., Inc.*, 726 F.2d 1346, 1354 (9th Cir. 1984). The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987); *see Miller v. Fairchild Indus.*, 797 F.2d 727, 731-32 (9th Cir. 1986); *Mannikko v. Harrah's Reno, Inc.*, 630 F.Supp. 191, 197 (D.Nev. 1986). If the plaintiff makes out a prima facie case, the burden shifts to the defendant "to articulate some legitimate, non-retaliatory reason for the adverse action." *Cohen*, 686 F.2d at 796. The burden then shifts back to the plaintiff to show that the asserted reason is pretextual. *Id.*

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[8]We have stated that "it is clear that Congress incorporated the protections against retaliation in its enactment of § 2000e-16." *Ayon v. Sampson*, 547 F.2d 446, 450 (9th Cir. 1976).

The district court did not explicitly conform its findings to this framework. But it appears to have found (1) that Jordan failed to establish that some of the alleged adverse actions were actually adverse; and (2) that the defendant showed legitimate, nonpretextual reasons for the adverse actions actually taken against Jordan. These findings add up to a conclusion that the defendant did not retaliate against Jordan which we review under the clearly erroneous standard. *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782,-784 (9th Cir. 1986).

[4] Jordan's approach is somewhat different. She says that she engaged in two types of protected activity: (1) she resisted DeVall's overtures toward her; and (2) she filed an administrative complaint alleging sex discrimination. While the second action is protected activity under § 2000e-3(a), her alleged resistance to DeVall's advances only qualifies as protected activity if DeVall's advances actually occurred and were an "unlawful employment practice" under Title VII. The district court found this not to be the case, and its findings are not clearly erroneous. This leaves only the administrative complaint as a protected activity. As to it, she must show that any adverse action was caused by such activity.

[5] But was there any such "adverse action"? Jordan lists several adverse actions she alleges were taken against her in retaliation. She says that these actions culminated in her constructive termination. She alleges: (1) DeVall delayed submitting Jordan's promotion papers in Fall 1972, so that Jordan remained at a GS-5 level longer

than necessary;[9] (2) DeVall increased her duties without amending her job description; (3) DeVall denied her requests to attend management courses; (4) DeVall undermined her position after October 1974 by taking away higher level duties; (5) DeVall gave her several poor performance appraisals and put derogatory memos in her file; (6) Jordan's supervisors drew up Performance Standards for her position, allegedly as a means of review-

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[9]Before Jordan began working at the Service, she worked at the Alaska Railroad. In a pre-trial joint statement of uncontested facts, the parties agreed that Jordan was employed by the Alaska Railroad at the equivalent of a GS-4 level. The district court adopted the stipulation of facts in its final pre-trial order. *See* E.R. tab 169 at 2. In April 1972, when Jordan started at the Service, she was hired at the GS-5 level. It was necessary for her to spend a year at the GS-5 level before she was eligible to be promoted. She was promoted to the GS-7 level in June 1973.

Jordan now argues that her position at the Alaska Railroad was a GS-5 equivalent, and that her pre-trial stipulation to the contrary was in error. If Jordan was the equivalent of a GS-5 employee at the Alaska Railroad, then she would have been eligible for promotion to a GS-7 position as soon as she began working for the Service. Appellant's Reply Brief at 23. Her promotion to a GS-7 position therefore would have occurred eighteen months after completing her time-in-grade, not two months, as the court found. *Id.* at 25.

Federal Rule of Civil Procedure 16(e) states that a pre-trial order "shall control the subsequent course of the action unless modified by a subsequent order" and a final pre-trial order "shall be modified only to prevent manifest injustice." The decision whether to amend the pre-trial order is within the discretion of the trial court. *See Colvin v. United States*, 549 F.2d 1338, 1340 (9th Cir. 1977).

There is no "manifest injustice" here. Moreover, Jordan never moved at trial for a modification of the pre-trial order. After reviewing the record, we find that the trial court's decision to rely on the stipulation of facts was not an abuse of discretion.

ing later performance unfavorably; (7) DeVall directed Jordan's work to other employees; and (8) upon her return to work in November 1978, Jordan was given a position limited to clerical work. Appellant's Brief at 33-35, 37. She argues that these actions amounted to a pattern of harassment that caused her constructive discharge. *Id.* at 39.[10]

[6] The district court examined all of the challenged actions, including those that took place before Jordan filed her administrative complaint,[11] and found that: (1) some of these actions occurred, but did not really have an adverse impact on Jordan; (2) those adverse actions that the defendant took were not caused by protected activity because the defendant had legitimate, nonpretextual reasons for the adverse actions it did take; and (3) the actions taken did not create an abusive environment that led to Jordan's constructive discharge. It stated, "The conduct which Plaintiff asserts to be retaliatory appears to the Court to be more a reaction to a problem of clashing personalities than acts in retaliation for the filing of a dis-

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[10]"A constructive discharge occurs when, looking at the totality of circumstances, 'reasonable person in [the employee's] position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.'" *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (*quoting Satterwhite v. Smith*, 744 F.2d 1380, 1381 (9th Cir. 1984)). If shown, constructive discharge is an adverse employment action. *See* 3 A. Larson & L. Larson, *Employment Discrimination* § 87.20, at 17-103 to 17-105 (1987).

[11]The district court reviewed the actions that took place before Jordan filed her complaint as if DeVall did proposition Jordan and she rejected him. *See* Findings of Fact 14, 15, 16, E.R. tab 184 at 6-7.

crimination complaint." Finding of Fact 16, E.R. tab 184 at 7.

The district court's findings are not clearly erroneous. After reviewing the record, we would reach the same conclusion under the de novo standard.

C. *Partial Summary Judgment*

[7] In the October 1985 partial summary judgment, the trial court held that the defendant terminated Jordan's employment in January 1980 because Jordan refused to return to work after November 1979. The court held that the defendant did not have a discriminatory or retaliatory reason for the discharge, and that 42 U.S.C. § 2000e-5(g) therefore prevented Jordan from being reinstated into her job because of the January 1980 termination. E.R. tab 150.

[8] The defendant suggests that Jordan cannot challenge this partial summary judgment because Jordan's attorney did not file a motion in opposition to the defendant's request for such judgment. Local General Rule 5(B)(4) provides that "[f]ailure to file a brief by the adverse party shall be deemed an admission that, in the opinion of counsel, the motion is well taken." The defendant relies on this rule, which the trial court also relied on in part. However, Jordan wrote a letter to the court, apparently with the primary intention of requesting an extension of time for her attorney to file a response to the defendant's motion. *See* Supplement to Appellant's Appendix, Reply Brief. The court did not consider this letter. *Id.*

Jordan does not appear to argue that the court should have considered the letter as a request for an extension of

time; rather, she argues that the letter "sufficiently raise[d] substantial issues of fact to preclude summary judgment, at least by default." Appellant's Brief at 40.

Utilizing the de novo standard, we affirm the district court's grant of partial summary judgment. First, Jordan does not contest the district court's decision that the local rules prevented consideration of the letter. Second, even if the court should have considered it, the letter did not raise a genuine issue of material fact as to the reason for Jordan's January 1980 termination. Nor does Jordan raise a factual issue as to that question now. The district court found that Jordan was finally terminated because she refused to return to work. Jordan argues that she did not return to work because she had been constructively discharged. That argument is not inconsistent with the government's assertion that she was finally, formally terminated in January 1980 because she would not return to work.[12] We therefore affirm the district court's October 1985 partial summary judgment.

D. *The Administrative Record*

This leaves only the issue pertaining to Jordan's 773-page administrative record. The defendant successfully moved to admit the entire record. Jordan now argues that the district court erred in admitting the entire record. The decision to admit the record was within the discretion of

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[12]Of course, if Jordan had been able to prove at trial that she was constructively terminated, then reinstatement still would have been a possible remedy. The October 1985 partial summary judgment did not foreclose the remedy of reinstatement for constructive discharge. E.R. tab 150.

the trial judge. *Plummer v. Western Int'l Hotels Co.*, 656 F.2d 502, 504 (9th Cir. 1981); *Bradshaw v. Zoological Soc'y*, 569 F.2d 1066, 1069 (9th Cir. 1978).

At the time the court admitted the record, it stated that it would read only the parts of the record that the parties indicated. Later, the court told the parties that it had read the entire record. Jordan argues that she relied on the court's promise not to read the entire record. We fail to see how Jordan was hurt or the court erred in reading all of a record that it admitted into evidence.

Jordan insists, however, that the record "was incomplete and tainted." This evidence consists of Jordan's testimony that she remembered seeing some documents "packed and ready to be sent to Washington as a part of the report" that, according to Jordan, were not included in the record introduced at trial. Appellant's Brief at 44-45. This is too problematic; it is insufficient to lead us to the conclusion that the record was "tainted."[13]

AFFIRMED.

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[13]Even if Jordan could show that the admission of the entire record was improper, that alone would not be ground for reversal "if there was competent evidence received sufficient to support the findings. The judge will be presumed to have disregarded the inadmissible and relied on the competent evidence." *Plummer*, 656 F.2d at 505 (quoting E. Cleary, *McCormick on Evidence* § 60, at 137 (2d ed. 1972)). There was sufficient evidence outside the administrative record to support the court's findings.

APPENDIX 7

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EVELYN JORDAN,	)
	)
Plaintiff/Appellant,	)
	)
v.	)
	)
WILLIAM P. CLARK, Secretary of the Department of the Interior,	)
	)
Defendant/Appellee.	)
	)

Case No. CA-86-3985

PETITION FOR RECONSIDERATION AND REHEARING

Plaintiff/Appellant, Evelyn Jordan, moves for reconsideration of the judgment entered in this action on May 24, 1988. Plaintiff also requests a rehearing.

GROUNDS

This petition is based upon the following grounds:

1. In the opinion of petitioner, the Court has overlooked critical facts showing that there existed an abusive and hostile working environment.

2. In the opinion of petitioner, the Court misapprehended the law set forth in *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982). *Cohen* articulates the framework for establishing a prima facie case of a harassing environment. The burden must shift to the employer to

show by clear and convincing evidence that it had no improper motives in taking adverse actions against Plaintiff.

Petitioner believes these points are substantial for the following reasons:

ARGUMENT

Abusive and Hostile Work Environment

The District Court acknowledged that conduct equating to sexual misconduct occurred in the work place. The District Court then erroneously concluded that no abusive environment existed in this work situation.

Once the Court concluded that sexual misconduct had occurred against Appellant, it should have then logically followed that the misconduct caused an abusive environment. If an employee has been affronted and that action effects the employee in their work position, clearly an abusive environment exists. For the Court to find otherwise, is contrary to the facts of this case and was error.

In spite of attempts to portray Plaintiff as a temptress because of the way she dressed, there is no evidence that anyone was provoked. Only DeVall ever acted improperly towards her. The fact that Plaintiff may have dressed in the manner that someone perceived to be suggestive does not mean that any employer can view that as an open invitation for sexual favors. An employee is free to dress as they wish. If the employer then uses their position for sexual purposes, they have violated the act. Furthermore, the fact that only one individual viewed this manner of dress as provocative would seem to indicate that Plaintiff's dress was not such that any reason-

able person could view it in the light that DeVall obviously did. This attempted portrayal, therefore, provides no assistance to the Defendant in the defense of this litigation, and should not have been used by the Court in their decision.

There is no question that the sexual advances were made and unwelcome. There is nothing voluntary about being subjected to off-color stories and comments and sexual commentary in an office environment, where the only relief that is available is to do nothing and endure the harassment or engage in a dramatic and visible rejection of the sexual overtures, resulting in retaliation, constructive discharge or other adverse actions taking place. *Bundy v. Jackson,* 641 F.2d 934, 946 (D.C. Cir. 1981). Resisting sexual overtures is a protected activity. The District Court found that advances must occur and must be an unlawful employment practice for the resistance to qualify as a protected activity. The District Court's findings that the sexual advances that did occur do not qualify as an unlawful employment practice are clearly erroneous. The District Court appeared to distinguish sexual advances in the work place into permissible and impermissible categories. The District Court found that the advances here fell in the permissible category. It is clear that the advances were unwanted. It is clear that they effected the work place environment and that they, therefore, were unlawful. For the Court to find otherwise was not proper.

It is not necessary to prove that Plaintiff resisted the sexual overtures to show discrimination. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57 (1986). The conduct of Devall against Plaintiff was sufficient to meet

the standard for stating a claim for sexual harassment. Sexual advances by themselves are discrimination. *Barnes v. Castle,* 561 F.2d 983 (D.C. Cir. 1977). Once harassment is shown through hostile or offensive actions, no further showing is required to prove that discrimination occurred.

The Court overlooked the knowledge that an off-work encounter transpired which established a prima facie case of hostile work environment under *Cohen.* Why the Court ignored this incident is unclear. The fact that it did overlook this off-work encounter, despite the holding of this Court in *Cohen,* should have been addressed by both the District Court and the Court of Appeals. Failure to discuss or consider this incident, and the dramatic effect of that failure on the final decision of the District Court and this Court, provides a basis for reconsideration now. How this incident effects the over all decision needed to be addressed. It was not.

Harassment on the basis of sex exists if the employer's conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. *Meritor,* supra. The working environment created by DeVall was clearly intimidating, hostile and offensive. DeVall told off-color stories and made sexist comments in the work place. Plaintiff was subject to at least one unwelcome sexual accosting in an off-work encounter with DeVall. The District Court's finding that there was no hostile or offensive work environment was clearly erroneous in light of the *Bundy* and *Meritor* guidelines.

The instances of adverse actions, coupled with the hostile and offensive work place environment, resulted in Plaintiff's constructive termination. It is incongruous for the District Court to have found that some adverse actions occurred, but that they did not really have an adverse impact on Plaintiff. The District Court's finding is clearly erroneous. When taken as a whole, the circumstances in the work environment in this case would cause a reasonable person in Plaintiff's position to feel that she was forced to quit because of intolerable and discriminatory working conditions. Instead, the District Court denied that there was any sexual discrimination or harassment and allowed only the retaliation for filing an administrative complaint portion of Plaintiff's claim to stand both should have proceeded.

Furthermore, the Court appears to have engaged in circular reasoning when discussing constructive discharge and, has thus, begged the question. If she did not return to work because she was constructively discharged, the employer may not justify continuing the termination because the employee did not return to work. That in essence is what the Court has found. It must first deal with the question of constructive discharge. If it finds that that occurred, it does not matter that the employer then stated to the employee that they would be terminated for not returning to work. A constructive discharge is a discharge. An employer cannot support its discharge by stating that the employee will be terminated when they do not return. It must correct the work environment first. It never did this and, thus, the constructive discharge stands. Once that is so, it is of no help to the employer to later terminate the employee for not returning to work.

One cannot terminate an already discharged employee. Just as when an employee quits a job, they could not be fired for not being at work, an employee already constructively discharged, cannot be discharged again. For the Court to find that the Government's assertion regarding the termination is not inconsistent with Jordan's claim of constructive discharge is error. It is completely inconsistent. A constructive discharge occurs at the precise moment that the employee quits because they cannot tolerate the work environment. That ends the employer employment relationship. Any subsequent attempt to terminate the employee by the employer cannot assist the employer's case. The Court was, therefore, in error, reconsideration is appropriate on this ground.

Clearly, the Appellant set forth a prima facie case that the work environment consisted of sexual humor and overtones towards and against her. It is also clear that these overtures and comments were unwanted. Plaintiff further demonstrated in her prima facie case that the situation became so intolerable that continuing employment was not possible. The theory of constructive discharge has long been recognized by arbitrators and courts. Why the District Court, under these circumstances, did not at least find that a prima facie case had been made by the Plaintiff in this regard is unclear. The fact that it did not, however, was error. This Court in its reconsideration should consider that fact and the dismissal of that allegation in determining whether or not the District Court erred in its decision. Clearly, the facts demonstrate that it has.

There was a clear misapprehension of crucial facts in the record concerning the investigative findings of retali-

ation. Filing an administrative complaint is a protected activity. Plaintiff established a prima facie case by documenting the filing of an administrative complaint. The pattern of harassment resulted in constructive discharge. The District Court found that some adverse actions occurred, but that the actions *did not really* have an adverse impact on Plaintiff. This finding is incongruous and clearly erroneous. An adverse action has an impact by its very definition. If the abusive actions occurred, and were not merely vaporous allegations, an adverse impact occurred which culminated in the constructive termination of Plaintiff. The District Court appears to have placed a burden on the Plaintiff that is almost impossible to meet. Once the Court has found an adverse action against Plaintiff occurred, it should not then require Plaintiff to show that this action be, by some sort of factual demonstration, has an adverse impact. This requires Plaintiff to make an almost impossible showing. An adverse action, as noted, will always impact the employment relationship. It did in this case, and Plaintiff made a prima facie showing that that was so, when it proves an adverse action was taken against her.

Framework for Determining Issues

This Court has failed to consider the effect of the District Court's disregard for the mandate to follow the framework of *Cohen,* and by the District Court's overlooking the necessity to find a shifting of the burden of proof to the employer, after Plaintiff established a prima facie case. In *Cohen,* the Court of Appeals articulated the framework for establishing a prima facie case of retaliation arising from a hostile or abusive work environ-

ment. In *Cohen,* the Court set forth the burden in this manner. Once the Plaintiff establishes that an adverse action occurred, the burden shifts to the Defendant employer. The employer must then articulate some legitimate reason for taking the adverse action. If the Plaintiff can prove that the adverse action was pretextual, a casual link is established substantiating a claim of retaliation.

The District Court did not conform its findings to the above framework, but instead raised Plaintiff's standard for proving a prima facie case to a higher degree than the *Cohen* decision requires. The District Court appeared to have found that Plaintiff failed to establish that *some* of the adverse actions taken by the employer were actually adverse. This finding by the District Court is incongruous on its face. As the Court noted on Page 5867, Plaintiff alleges that:

> "(1) DeVall delayed submitting Jordan's promotion papers in Fall 1972, so that Jordan remained at a GS-5 level longer than necessary; (2) DeVall increased her duties without amending her job description; (3) DeVall denied her requests to attend management courses; (4) DeVall undermined her position after October 1974 by taking away higher level duties; (5) DeVall gave her several poor performance appraisals and put derogatory memos in her file; (6) Jordan's supervisors drew up Performance Standards for her position, allegedly as a means of reviewing later performance unfavorably; (7) DeVall directed Jordan's work to other employees; and (8) upon her return to work in November 1978, Jordan was given a position limited to clerical work." It then noted at

Page 5869 that the Court found that some of these actions occurred. Plaintiff, thus, demonstrated that adverse actions were taken, *Cohen* required the Court to place the shifting burden on the Defendant to explain why it did what it did. That burden apparently never shifted. The Court never got to that step in the *Cohen* formula and, thus, never forced the Defendant to justify its actions. Plaintiff cannot show that the defense raised is pretextual if the Defendant is not required to raise a defense in the first place. That is what occurred here. Despite the fact that sexual discrimination was found to have occurred, and despite the fact that adverse actions also were taken, the Court stopped its analysis there. That was error on the part of the District Court. A failure to consider that error by this Court provides an additional basis for reconsideration.

The District Court seemed to ignore logic in trying to determine what a reasonable person under similar circumstances might believe. Plaintiff's belief that she was being sexually harassed, and that that harassment was effecting her employment relationship. This was not an unreasonable belief under the circumstances. Any reasonable person would have had a similar belief had they been in the situation that Plaintiff found herself in. Why did the Court not view the situation under those circumstances? Courts frequently look to determine what a reasonable person would do or believe under a similar set of circumstances. The law requires that much. The District Court, however, failed to make a determination as to whether or not someone under similar circumstances might believe as the Plaintiff did. Had the Court done so, it would be

clear that an adverse impact resulting from the adverse action was logical and would then infer that it was so. The burden, as noted, would of then shifted and Defendant would have been required to put on evidence that it was not required to do.

The District Court stated that advances must occur and must be an unlawful employment practice to qualify as a protected activity. The Court "split the difference." This finding is prejudicial error. Plaintiff's burden under *Cohen* is to establish that DeVall made unwanted sexual advances. The District Court should not split the difference, but rather must shift the burden, as noted, to the employer to establish reasons for taking the adverse actions that followed the unwelcome sexual harassment. In light of DeVall's admission that an advance was made, albeit by Jordan, splitting the difference by saying nothing occurred is erroneous. Both sides admitted it occurred, but dispute who made the advance. A finding that nothing occurred is, therefore, incongruous.

The District Court rejected the framework set forth in *Cohen,* and found that Plaintiff's resistance of the sexual overtures was not a protected activity. This finding is erroneous in view of the District Court's determination that the parties engaged in flirtatious conversation which could, and probably did, leave each of them with the impression that he or she had been the recipient of a sexual advance. Thus, the Court overlooked again a very significant event. Just like it had overlooked the off-duty encounter, it overlooked this incident also.

Under *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57 (1986), to establish a hostile or abusive work environ-

ment theory of sexual harassment, Plaintiff need only show that discrimination based on sex has created that hostile or abusive work environment. Plaintiff here established that she was subjected to sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature, and that this conduct was unwelcome. It is clearly erroneous to find that this conduct was not sufficiently severe or pervasive to alter the conditions of the victims employment, and that it did create an abusive working environment. The District Court's handling of the case left the burden on Plaintiff to show not only that the activity occurred, but that the employer had no pretextual reason for taking adverse actions against Plaintiff, without Defendant having to show justification for its action. Yet with this proof, again the burden never shifted, contrary to the requirements of *Cohen*. The District Court overlooked the fact that adverse actions occurred which impacted Plaintiff. As discussed above, the burden should have then shifted at trial to the employer to articulate some legitimate non-retaliatory reason for the adverse action.

The Court also required little evidence to substantiate the claim that her position was abolished, other than Defendant making assertions that it was so. This also was error. Some supporting documentation should have been required, but was not.

In addition, the District Court recognized the occurrence of an off work encounter between Plaintiff and DeVall. One adverse action by itself is enough to establish harassment. There was thus protected activity, and the incident alone had established a prima facie case.

Plaintiff established a prima facie case. Thus, there are several examples that Plaintiff gave and proved to make out its case, but were ignored in Court when it failed to shift the burden.

It is difficult but not impossible to decide hostile environment cases without a tangible event to measure against. It is clearly erroneous to find here that no tangible events occurred, especially in light of the off-work encounter, and the flirtatious conversation. The District Court did not clarify Plaintiff's burden in presenting a prima facie case of retaliation. Plaintiff deserves to be able to meet her burden with the benefit of the relaxed showing required for a sexual discrimination case pursuant to *Bundy v. Jackson,* 641 F.2d 934 (D.C. Cir. 1981). The employer should then be required to show by clear and convincing evidence that it did not have improper motives for taking adverse actions against Plaintiff. The Appellate Court's decision should be reconsidered and the case remanded to the District Court for a proper consideration of Plaintiff's prima facie sexual discrimination case under the framework of *Cohen,* with the proper shifting of the burden to the employer as to whether it met its burden of showing non-discriminatory motives for its denial of benefits to Plaintiff.

The Appellate Court misapprehended the law of *Cohen* in not requiring remand to make the government show by clear and convincing evidence that it had no improper motives in its adverse actions towards Appellant.

One final point should be made. The District Court found that sexual suggestions were made to other coworkers, but that they were made in a kidding manner.

Other women testified that they did not take it seriously, or in the alternative that it did not effect their employment. One point the Court overlooked, however, was that none of these individuals were supervised by DeVall. They were not similarly situated since he could not effect their position to the extent he could effect Jordan's. Thus, the fact that they did not feel threatened is of no significance and should not have been relied upon by the Court.

Wherefore, Petitioner respectively requests that this Court reconsider its decision dated May 24, 1988, and order a new hearing on the matter.

DATED this 6th day of July, 1988.

/s/ Frederic R. Dichter
Attorney for Appellant
Evelyn Jordan

APPENDIX 8

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EVELYN JORDAN,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 86-3985
v.	)	ORDER
	)	
WILLIAM P. CLARK, Secretary of the Department of the Interior,	)	(Filed July 19, 1988)
	)	
Defendant-Appellee.	)	

Before: SNEED, HALL, and NOONAN, Circuit Judges.

Appellant's petition for reconsideration and rehearing is denied.